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In the Supreme Court of the United States

UNITED STATES OF AMERICA, ET AL., APPELLANTS

v.

AMERICAN LIBRARY ASSOCIATION, INC., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

The Children's Internet Protection Act (CIPA), Pub. L. No. 106-554, Div. B, Tit. XVII, 114 Stat. 2763A-335, provides that a library that is otherwise eligible for special federal assistance for Internet access in the form of discount rates for educational purposes under the Telecommunications Act of 1996, 47 U.S.C. 254(h) (Supp. V 1999), or grants under the Library Services and Technology Act, 20 U.S.C. 9121 *et seq.*, may not receive that assistance unless the library has in place a policy that includes the operation of a "technology protection measure" on Internet-connected computers that protects against access by all persons to "visual depictions" that are "obscene" or "child pornography," and that protects against access by minors to "visual depictions" that are "harmful to minors." 47 U.S.C. 254(h)(6)(B) and (C) (Supp. V 1999); 20 U.S.C. 9134(f)(1).

The question presented is whether CIPA induces public libraries to violate the First Amendment, thereby exceeding Congress's power under the Spending Clause.

PARTIES TO THE PROCEEDINGS

The following persons and organizations were plaintiffs in the district court: The American Library Association, Inc.; the Freedom to Read Foundation; the Alaska Library Association; the California Library Association; the New England Library Association; the New York Library Association; the Association of Community Organizations for Reform Now; the Friends of the Philadelphia City Institute Library; the Pennsylvania Alliance for Democracy; Elizabeth Hrenda; C. Donald Weinberg; the Multnomah County Public Library; the Connecticut Library Association; the Maine Library Association; the Santa Cruz Public Library Joint Powers Authority; the South Central Library System; the Westchester Library System; the Wisconsin Library Association; Mark Brown; Sherron Dixon, by her father and next friend Gordon Dixon; James Geringer; Marnique Tynesha Overby, by her aunt and next friend Carolyn C. Williams; Emmalyn Rood, by her mother and next friend Joanna Rood; William J, Rosenbaum; Carolyn C. Williams; Quiana Williams, by her mother and next friend Sharon Bernard; Afraidtoask.com; Alan Guttmacher Institute; Ethan Interactive, Inc. d/b/a Out in America; Naturist Action Committee; Wayne L. Parker; Planned Parenthood Federation of Am., Inc.; Planetout.com; Jeffery Pollock; and Safersex.org.

The following persons and organizations were defendants in the court below: The United States of America; the Federal Communications Commission; Michael Powell, in his official capacity as Chairman of the Federal Communications Commission; the Institute of Museum and Library Services; and Robert S. Martin,

in his official capacity as the Director of the Institute of Museum and Library Services (IMLS). Before Robert S. Martin became Director of IMLS, Beverly Sheppard was a defendant in her official capacity as Acting Director of IMLS.

N2H2 was granted leave to intervene for the limited purpose of asserting its confidentiality interests in certain trial exhibits and deposition transcripts.

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JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the district court (J.S. App. 1a-191a) is reported at 201 F. Supp. 2d 401.

JURISDICTION

The order of the district court (J.S. App. 191a) was entered on May 31, 2002. A notice of appeal (J.S. App. 209a-211a) was filed on June 20, 2002. The jurisdiction of this Court is invoked under Section 1741(b) of the Children's Internet Protection Act, Pub. L. No. 106-554, Div. B, Tit. XVII, 114 Stat. 2763A-352, and 28 U.S.C. 1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article 1, Section 8, Clause 1 of the Constitution provides that "[t]he Congress shall have Power to lay

and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." The First Amendment of the Constitution provides that "Congress shall make no law * * * abridging the freedom of speech." The pertinent provisions of the Children's Internet Protection Act (CIPA), Pub. L. No. 106-554, Div. B, Tit. XVII, 114 Stat. 2763A-335, the Telecommunications Act of 1996, 47 U.S.C. 254(h) (Supp. V 1999), and the Library Services and Technology Act, 20 U.S.C. 9121, 9122, 9133, 9134, 9141, are reproduced in a separately bound appendix to this jurisdictional statement. J.S. App. 192a-208a.

STATEMENT

1. Under the Telecommunications Act of 1996, 47 U.S.C. 251 *et seq.*, telecommunications providers must provide Internet access at discounted rates (E-rates) to elementary schools, secondary schools, and libraries for educational purposes. 47 U.S.C. 254(h)(1)(B) (Supp. V 1999). Discounts under the E-rate program reduce the cost of Internet access by 20% to 90%, depending on the extent of economic disadvantage in a particular location. See 47 C.F.R. 54.505. For the year ending June 30, 2002, libraries and library consortia received $58.5 million in E-rate discounts. Joint Trial Stipulations para. 128. The Universal Service Administrative Company administers the E-rate program under the supervision of the Federal Communications Commission. 47 C.F.R. 54.701, 54.702.

The Library Services and Technology Act (LSTA), 20 U.S.C. 9121 *et seq.*, also establishes a program of federal assistance to libraries. Under that program, the Institute of Museum and Library Services makes grants of congressionally appropriated funds to state

library administrative agencies with approved plans. See 20 U.S.C. 9133, 9141. Those grants may be used for, *inter alia*, "electronically linking libraries with educational, social, or information services" and "paying costs for libraries to acquire or share computer systems and telecommunications technologies." 20 U.S.C. 9141(a)(1)(B) and (E). In fiscal year 2002, Congress appropriated more than $149 million in LSTA grants for state library agencies. Joint Trial Stipulations para. 185.

Aided by the E-rate and LSTA programs, libraries have increasingly provided their patrons with access to content on the Internet. In 1996, 44.4% of public libraries in the United States were connected to the Internet. United States Nat'l Comm'n on Libraries and Information Science, *Moving Toward More Effective Public Internet Access: The 1998 National Survey of Public Library Outlet Internet Connectivity* 5 (Mar. 1999). By 2000, 95% of the nation's libraries were connected to the Internet. J.S. App. 36a.

Congress established the E-rate and LSTA programs in order to further the educational, learning, and informational missions of libraries. See 47 U.S.C. 254(h) (Supp. V 1999); 20 U.S.C. 9121, 9141(a)(1)(B). Congress recognized, however, that a library's connection to the Internet could also enable library patrons to obtain access to a vast amount of illegal and harmful pornographic visual depictions. S. Rep. No. 141, 106th Cong., 1st Sess. 2 (1999). Congress was concerned that facilitating access to such pornographic material would be inconsistent with the educational purposes of the assistance it was providing. S. Rep. No. 226, 105th Cong., 2d Sess. 5 (1998). The Senate Committee on Commerce, Science, and Transportation held a hearing to examine the nature of the problem and potential

legislative solutions.[1] During that hearing, evidence was presented that filtering software could provide a reasonably effective way to prevent access to illegal and harmful pornographic material. S. Rep. No. 226, *supra*, at 5-6.

Following the hearing, Congress enacted the Children's Internet Protection Act, which provides that a library may not receive assistance to establish access to the Internet under the E-rate or LSTA program, unless it has a policy of Internet safety that includes the operation of a "technology protection measure" that protects against access by all persons to "visual depictions" that are "obscene" or "child pornography," and that protects against access by minors to "visual depictions" that are "harmful to minors." 20 U.S.C. 9134(f)(1)(A)(i) and (B)(i); 47 U.S.C. 254(h)(6)(B)(i) and (C)(i) (Supp. V 1999). A "technology protection measure" is defined as "a specific technology that blocks or filters Internet access to" material covered by CIPA. 47 U.S.C. 254(h)(7)(I) (Supp. V 1999).[2]

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[1] See *The Children's Internet Protection Act: Hearing on S. 97 Before the Senate Comm. on Commerce, Science and Transportation*, 106th Cong., 1st Sess. (1999).

[2] CIPA adopts the definitions of "obscene" and "child pornography" set forth in the federal criminal code. 20 U.S.C. 9134(f)(7)(D); 47 U.S.C. 254(h)(7)(E) (Supp. V 1999) (incorporating 18 U.S.C. 1460's definition of "obscene"); 20 U.S.C. 9134(f)(7)(A); 47 U.S.C. 254(h)(7)(F) (Supp. V 1999) (incorporating 18 U.S.C. 2256's definition of "child pornography"). CIPA defines "harmful to minors" as "any picture, image, graphic image file or other visual depiction that—(i) taken as a whole and with respect to minors, appeals to a prurient interest in nudity, sex, or excretion; (ii) depicts, describes, or represents, in a patently offensive way with respect to what is suitable for minors, an actual or simulated sexual act or sexual contact, actual or simulated normal or perverted sexual acts, or a lewd exhibition of the genitals; and (iii) taken as a whole, lacks serious literary, artistic, political, or scientific value as to minors." 20 U.S.C. 9134(f)(7)(B); 47 U.S.C. 254(h)(7)(G) (Supp. V 1999). CIPA defines a "minor" as an individual under the age of 17. 20 U.S.C. 9134(f)(7)(C); 47 U.S.C. 254(h)(7)(D) (Supp. V 1999).

CIPA permits the "disabling" of a technology protection measure "to enable access for bona fide research or other lawful purposes." 20 U.S.C. 9134(f)(3); 47 U.S.C. 254(h)(6)(D) (Supp. V 1999). Under the E-rate program, disabling is permitted "during use by an adult." 47 U.S.C. 254(h)(6)(D) (Supp. V 1999). Under the LSTA program, disabling is permitted during use by any person. 20 U.S.C. 9134(f)(3).

Congress enacted CIPA pursuant to its authority under the Spending Clause of the Constitution, Article I, Section 8, Clause 1, to establish conditions on the receipt of federal assistance. S. Rep. No. 141, *supra*, at 8. Congress made clear that if a library wishes to provide unfiltered access, it may do so with its own funds. S. Rep. No. 226, *supra*, at 5. Congress also noted that CIPA involves filtering material based on its sexually explicit content, not based on its viewpoint. *Ibid.*

Congress also understood that a library is not a traditional public forum open to unrestricted First Amendment activity. Congress was aware that libraries impose strict rules to maintain "an atmosphere for reading and study," that "[p]atrons are not permitted to give speeches, make public statements, sing, [or] speak loudly," and that "[i]t is the exclusive authority of the library to make affirmative decisions regarding what books, magazines, or other material is placed on library shelves, or otherwise made available to patrons." S. Rep. No. 141, *supra*, at 8. Congress did not view a decision to provide Internet access as funda-

mentally altering the library's mission. Instead, it viewed such access as a component of the library's overall assembling of a collection. In Congress's judgment, connecting a library computer to the Internet "is simply another method for making information available in a * * * library. It is no more than a technological extension of the book stack." *Id.* at 7.

2. A group of libraries, library associations, library patrons, and web site publishers (appellees) filed suit in the United States District Court for the Eastern District of Pennsylvania against the United States and the government agencies and officials responsible for administering the E-rate and LSTA programs, challenging the constitutionality of CIPA's filtering provisions. J.S. App. 5a. Appellees alleged that CIPA is facially unconstitutional because it induces public libraries to violate the First Amendment, and because it imposes an unconstitutional condition on a library's exercise of its own First Amendment rights. *Ibid.* Pursuant to Section 1741(a) of CIPA, a three-judge district court was convened. J.S. App. 6a. After a trial, the district court held that CIPA is facially unconstitutional because it induces public libraries to violate the First Amendment rights of their patrons. *Id.* at 13a. The court accordingly enjoined the government agencies and officials responsible for administering the E-rate and LSTA programs from withholding federal assistance from any public library for failure to comply with CIPA. *Id.* at 191a.

The district court analyzed the constitutionality of CIPA under the framework for Spending Clause legislation set forth in *South Dakota* v. *Dole*, 483 U.S. 203, 207-210 (1987). J.S. App. 95a. Under that decision, the district court explained, Congress may not use its spending power "to induce the States to engage

in activities that would themselves be unconstitutional." *Ibid.* (quoting *Dole*, 483 U.S. at 210). For purposes of its analysis under *Dole*, the district court assumed that CIPA would be facially unconstitutional only if "any public library that complies with CIPA's conditions will necessarily violate the First Amendment." *Id.* at 102a. The court held that CIPA is facially unconstitutional when measured against that standard. *Ibid.*

The district court acknowledged that "generally the First Amendment subjects libraries' content-based decisions about which print materials to acquire for their collections to only rational [basis] review." J.S. App. 120a. But the court refused to apply that same constitutional analysis to libraries' content-based decisions regarding material they acquire from the Internet. *Id.* at 121a. The court reasoned that rational basis review applies to a government's "editorial discretion in selecting certain speech for subsidization or inclusion in a state-created forum" only when "the state actor exercising the editorial discretion has at least reviewed the content of the speech that the forum facilitates." *Ibid.* In the court's view, "[t]his exercise of editorial discretion is evident in a library's decision to acquire certain books for its collection." *Id.* at 122a. In contrast, the court continued, "in providing patrons with even filtered Internet access, a public library invites patrons to access speech whose content has never been reviewed and recommended as particularly valuable by either a librarian or a third party to whom the library has delegated collection development decisions." *Id.* at 123a. Based on its understanding that a library that provides Internet access "indiscriminately facilitates private speech whose content it makes no effort to examine," *id.* at 125a, the court

concluded that a library that offers Internet access necessarily creates a "designated public forum," *id.* at 109a.

The court next held that a public library's content-based restrictions on access to that "forum" trigger strict scrutiny. J.S. App. 128a. Based on its analysis of this Court's public forum and government subsidy decisions, *id.* at 127a-128a, the district court concluded that "where a public library opens a forum to an unlimited number of speakers around the world to speak on an unlimited number of topics, strict scrutiny applies to the library's selective exclusions of particular speech whose content the library disfavors," *id.* at 128a. The court also concluded that strict scrutiny is applicable based on its understanding that a library's provision of Internet access "promotes First Amendment values in an analogous manner to traditional public fora, such as sidewalks and parks, in which content-based restrictions on speech are always subject to strict scrutiny." *Ibid.*

Applying strict scrutiny, the district court first held that the government has a "well-established" compelling interest "in preventing the dissemination of obscenity, child pornography, or, in the case of minors, material [that is] harmful to minors." J.S. App. 139a. The court next concluded that, in certain circumstances, "a public library might have a compelling interest in protecting library patrons and staff from unwilling exposure to sexually explicit speech that, although not obscene, is patently offensive." *Id.* at 146a. Furthermore, the court found that "[t]he volume of pornography on the Internet is huge," and that "library patrons of all ages, many from 11 to 15, have regularly sought to access it in public library settings." *Id.* at 2a. The district court nonetheless held that a public

library's use of software filters to prevent access to categories such as "full nudity" and "sexual activity" (3/28/02 Biek Test. 29) is not narrowly tailored to further the government's interests. J.S. App. 149a. The court found that because of the limits of technology, filters set to prevent access to those categories also restrict "many thousands of Web pages that are clearly not harmful to minors, and many thousands more pages that, while possibly harmful to minors, are neither obscene nor child pornography." *Id.* at 148a-149a.

The district court also concluded there are less restrictive ways to prevent access to the content covered by CIPA. J.S. App. 157a-167a. The court determined that libraries "can adopt Internet use policies that make clear to patrons that the library's Internet terminals may not be used to access illegal content," and they "can detect violations of their Internet use policies either through direct observation or through review of the library's Internet use logs." *Id.* at 158a-159a. The court similarly determined that there are less intrusive methods to prevent patrons from "unwillingly being exposed to patently offensive, sexually explicit content," such as "plac[ing] unfiltered terminals outside of patrons' sight-lines and areas of heavy traffic" and "us[ing] privacy screens or recessed monitors." *Id.* at 165a-166a.

Finally, the district court held that CIPA's provisions permitting the disabling of filtering software do not cure CIPA's lack of narrow tailoring. J.S. App. 167a-177a. The court "assume[d] without deciding that the disabling provisions permit libraries to allow a patron access to any speech that is constitutionally protected with respect to that patron." *Id.* at 170a. It nonetheless held that "the requirement that library patrons ask

a state actor's permission to access disfavored content violates the First Amendment." *Ibid.* The court reasoned that patrons would be deterred from asking for permission to obtain access to information that is "sensitive in nature." *Id.* at 172a. While the court recognized that libraries may permit anonymous requests to disable filtering software, it regarded that option as inadequate because "such requests cannot immediately be acted on." *Id.* at 174a.[3]

THE QUESTION PRESENTED IS SUBSTANTIAL

This case involves a challenge to the constitutionality of two provisions of the Children's Internet Protection Act under which a public library may not receive federal assistance for Internet access unless it uses filtering software that prevents patrons from obtaining access to visual depictions on the Internet that are obscene, child pornography, or (in the case of minors) harmful to minors. The district court declared those

[3] In a lengthy footnote (J.S. App. 180a-188a n.36), the district court discussed appellees' alternative contention that CIPA imposes an unconstitutional condition on the First Amendment rights of libraries. In the course of that discussion, the court expressed the view that appellees' position that public libraries may assert First Amendment rights "may well be correct." *Id.* at 184a n.36. The court also stated that public libraries might also be able to "rely on their patrons' rights, even though their patrons are not the ones who are directly receiving the federal funding." *Ibid.* And the court further stated "that [appellees] have a good argument that CIPA's requirement that public libraries' use [of] filtering software distorts the usual functioning of public libraries in such a way that it constitutes an unconstitutional condition on the receipt of funds." *Id.* at 188a n.36. But the court ultimately did not resolve any of those issues. *Id.* at 179a-180a & 188a n.36. The court also did not address appellees' contentions that CIPA constitutes an invalid prior restraint on speech and is unconstitutionally vague. *Id.* at 179a.

two provisions unconstitutional on their face and enjoined their enforcement.

The district court's decision directly frustrates Congress's effort to ensure that special federal assistance made available to libraries to enable them to establish and maintain access to the Internet for educational and other purposes does not facilitate access to the enormous amount of illegal and harmful pornography on the Internet. Equally disturbing, by holding that a public library's use of filtering software to prevent access to the visual depictions covered by CIPA violates the First Amendment, the district court's decision deprives all the nation's public libraries—without regard to whether they receive federal assistance—of the ability to make their own independent judgments concerning how to avoid becoming a conduit for illegal and harmful material.

The district court's First Amendment holding is incorrect. A public library may exercise content-based judgments in deciding what information to make available to its patrons without violating the First Amendment. That principle not only applies to a library's acquisition of books, magazines, and videos; it also applies to a library's decisions regarding the material it will provide through its Internet-connected computers. A library that refuses to make available to its patrons pornographic magazines or XXX videos may also refuse to make available comparable material through those computers.

CIPA specifies that a decision holding its filtering provisions unconstitutional "shall be reviewable as a matter of right by direct appeal" to this Court. Pub. L. No. 106-554, App. D, § 1741(b), 114 Stat. 2763A-352. Because the district court invalidated important provisions of an Act of Congress on their face and did so

based on an erroneous constitutional analysis, the Court should note probable jurisdiction of the government's appeal and set the case for plenary review.

A. THE QUESTION PRESENTED IS IMPORTANT

This case involves the facial validity of Congress's effort in CIPA to ensure that federal assistance to libraries to establish Internet access does not facilitate access to visual depictions that are obscene, child pornography, or harmful to minors. Two CIPA provisions are at issue. The first provides that a library may not receive E-rate discounts for Internet service for educational purposes unless the library has in place a policy that includes the operation of a "technology protection measure" on Internet-connected computers that protects against access by all persons to "visual depictions" that are "obscene" or "child pornography," and that protects against access by minors to "visual depictions" that are "harmful to minors." 47 U.S.C. 254(h)(6)(B)-(C) (Supp. V 1999). The second provision at issue imposes the same condition on a library's receipt of grants to establish Internet access under the Library Services and Technology Act. 20 U.S.C. 9134(f)(1).

The district court expressly held that each of those provisions "is facially invalid, since [each] will induce public libraries, as state actors, to violate the First Amendment." J.S. App. 179a. The court's invalidation of CIPA's filtering provisions has profound consequences for both the federal government and the nation's public libraries. The court's ruling eliminates the protection Congress adopted to ensure that the assistance it provides to libraries to facilitate access to the wealth of valuable information on the Internet does not simultaneously enable access to the enormous

amount of illegal and harmful pornography that pervades the Internet.

The consequences for the nation's public libraries are equally unsettling. Public libraries often have policies that preclude the use of Internet-connected computers to obtain access to pornographic visual depictions, J.S. App. 37a, and, as of June 2000, 7% of those libraries already used filtering software on all of their computers as a means of furthering those policies, *id.* at 45a. The district court's ruling flatly condemns the use of any filtering software to enforce standard library policies against access to pornography. *Id.* at 179a. Moreover, under the district court's view that strict scrutiny applies to any content-based restriction on Internet access, *id.* at 128a, the standard policies of libraries to prevent access to pornographic visual depictions are themselves presumptively unconstitutional and may survive only if they are narrowly tailored to further compelling interests. The question presented in this case—whether CIPA's filtering provisions induce public libraries to violate the First Amendment rights of their patrons—is therefore one of great public importance.

B. CIPA'S FILTERING PROVISIONS ARE FACIALLY VALID

The district court erred in holding that CIPA is facially unconstitutional. While Congress may not use its spending authority "to induce the States to engage in activities that would themselves be unconstitutional," *Dole*, 483 U.S. at 210, CIPA does no such thing. A public library's use of filtering software to prevent its computers from being used to obtain access to the pornographic material covered by CIPA is a constitutionally permissible means for a public library to

exercise control over the material that it provides to its patrons. The district court's contrary conclusion rests on an unprecedented and erroneous application of strict scrutiny to a public library's exercise of editorial judgment.

1. A Public Library Does Not Create A Forum When It Provides Internet Access Through Its Own Computers, And Its Judgments Regarding The Material It Will Make Available Are Not Subject To Strict Scrutiny

a. The district court's application of strict scrutiny rests on the court's mistaken view that a public library creates a public forum when it provides access to content on the Internet through its own computers. A public library's exercise of judgment in selecting the material it will make available to its patrons is not subject to forum analysis. Forum analysis and its accompanying heightened judicial scrutiny are incompatible with the long-established and necessary discretion that public libraries must have to fulfill their traditional missions.

The first public library, the Boston Public Library, opened in 1854, and had as its original mission "to promote equality of education opportunity, to advance scientific investigation, to save youth from the evils of an ill-spent leisure, and to promote the vocational advancement of the workers." Expert Report of Donald G. Davis, Jr. 2. Over time, public libraries began to collect materials to serve additional purposes. For example, driven in part by a desire to serve broader community interests, libraries collect popular fiction as well as more traditional works. But facilitating learning and cultural enrichment has remained the traditional mission for most public libraries. Indeed,

the American Library Association's Bill of Rights still provides that "[b]ooks and other library resources should be provided for the interest, information, and enlightenment of all people of the community the library serves." J.S. App. 32a.

Consistent with their missions, libraries have always exercised judgment in deciding what materials to collect. In performing that important function, libraries have considered the content and value of available works as well as the needs and interests of the community. J.S. App. 35a. Libraries often rely on journal reviews and bibliographies as selection aids and establish standards to guide their collection decisions. *Ibid.* Libraries may also delegate to third party vendors the task of supplying resources that satisfy the library's collection standards. *Ibid.* In all cases, however, libraries remain responsible for the content of their collections. *Ibid.* Consistent with their traditional mission and their overriding responsibility to the communities that they serve, most libraries exclude pornographic works from their collections. 3/29/02 Cronin Test. 91. Only a handful of libraries collect Hustler magazine or XXX movie titles. J.S. App. 33a & n.4.

No decision of this Court suggests that forum analysis applies to a public library's traditional collection practices and decisions. Still less do this Court's decisions suggest that public libraries must justify the judgments they make in assembling their collections as narrowly tailored to further compelling interests. To the contrary, this Court's precedents make clear that the government has broad discretion to decide whether material is sufficiently worthwhile to involve the government in providing it. *NEA* v. *Finley*, 524 U.S. 569, 585-588 (1998); *Arkansas Educ. Television Comm'n* v.

Forbes, 523 U.S. 666, 672-675 (1998); *Rust* v. *Sullivan*, 500 U.S. 173, 193-194 (1991). That principle applies with particular force to public libraries.

Any other approach would risk transforming the role of public libraries in our society. Instead of public libraries exercising responsibility for the resources that they make available to the public, forum analysis would threaten to substitute judicial judgments regarding what is appropriate. Cf. *Arkansas Educ. Television*, 523 U.S. at 674. A public library's traditional exercise of discretion to determine what materials to collect would be particularly threatened by application of strict scrutiny to collection decisions, which would require a library to establish that a challenged decision furthers a "compelling" interest, and that "plausible" less restrictive alternatives would not be effective. *United States* v. *Playboy Entm't Group, Inc.*, 529 U.S. 803, 813, 816 (2000). Libraries would often be hard-pressed to show that the selection of one resource rather than another always furthers a "compelling" government interest. Nor are libraries likely to be in a position to demonstrate that there are no "plausible" alternatives that would be less restrictive, while still serving the library's overall collection goals. Libraries would also be vulnerable to charges that they have collected too many or too few works containing particular viewpoints. The very prospect of strict judicial review of collection decisions could chill libraries from exercising traditional editorial judgments.

b. The district court accepted the principle that libraries may select books for their collections on the basis of content without triggering strict scrutiny. Such collection decisions, the court concluded, are subject only to rational basis review. J.S. App. 120a. But the court refused to apply that same analysis to a

public library's editorial judgments regarding the content that it makes available through its Internet-connected computers. The court reasoned that, because public libraries do not exercise individualized judgments regarding the value of all web sites that they make available through their computers, they create public forums, from which any content-based exclusion must be justified under strict scrutiny. *Id.* at 125a-128a. That analysis is seriously flawed.

A public library does not provide Internet access in order to create a public forum for web publishers to speak, any more than it collects books in order to provide a public forum for the authors of the books to speak. It provides Internet access for the very same reasons that it offers other library resources—to facilitate research, learning, and enlightenment. Because of the vast amount of material on the Internet, and its ever-changing nature, it would be impossible for any public library to review every web site and make an individualized determination regarding whether that site has sufficient value to further the library's mission. But a public library's inability to review every web site in advance does not divest it of its traditional authority to make selective judgments regarding the information that it will provide to its patrons. The Internet does not need to be, as the district court assumed, an all-or-nothing proposition. Indeed, many libraries have taken actions demonstrating efforts to exercise the same kind of editorial judgments concerning the Internet that they routinely apply to other media.

For example, many libraries have decided that certain web sites have particular value, and they therefore provide links to those sites on the first screen a patron views on the library's computers. Joint Trial Stipulations para. 268. That judgment plainly gives

certain web speakers preferred access to library patrons on the basis of the content of their web sites. But it would be extraordinary to suggest that such a decision by a public library is presumptively unconstitutional.

Similarly, many libraries exercise their discretion to preclude the use of their computers to obtain access to certain Internet resources. For example, some libraries do not allow patrons to use the libraries' computers to send and receive e-mail messages or to participate in chat rooms because they regard the Internet primarily as a research and information tool. J.S. App. 37a-38a; GX 33, at 2-3, 83. Other libraries have concluded that web sites that include games, personals, or dating services are not sufficiently valuable or compatible with the libraries' mission to justify providing access to them. J.S. App. 37a-38a; GX 33, at 2-3, 83. Still others prevent access to sites that contain graphic violence or tasteless material. GX 71, 83, 99, 242, 244, 247. Those decisions reflect the same kind of judgments that libraries make when they decide what books, magazines, tapes, CD-ROMS, and videos to add to their collections. Nothing in this Court's First Amendment jurisprudence suggests that those decisions should be subjected to forum analysis, much less to strict scrutiny.

The same is true when a library decides to prevent its computers from being used to obtain access to visual depictions that are obscene, child pornography, or harmful to minors by enabling their computers to filter out such categories as "sexual activity" and "full nudity." If libraries have the discretion to refrain from including pornographic magazines and XXX movies in their collections, as they unquestionably do, there is no reason that a library's judgment not to offer access to

comparable material on the Internet should be treated as inherently suspect and presumptively unconstitutional.

c. In invoking forum analysis and applying strict scrutiny, the district court confused the constitutional status of the Internet itself with the constitutional status of a library's decision whether to allow the use its own computers to provide access to various types of material on the Internet. The Internet itself is a forum for First Amendment activity, but it is not one that is government-owned. When government places restrictions on what content may be placed on the Internet, it acts as a regulator of private activity, and its restrictions are subject to strict scrutiny. *Reno* v. *ACLU*, 521 U.S. 844 (1997). In contrast, when a public library brings Internet content into the library through its own computers, it acts as a collector of materials that it will make available to its patrons. In that capacity, the library necessarily has both the responsibility and the discretion to decide how little or how much of the Internet's content to provide. A web site publisher has no more right to insist on access to library patrons through library computers than a book author has to insist on access to library patrons through a library's book stacks.

d. Acceptance of the district court's contrary view would produce a number of startling consequences. Under the district court's analysis, a public library that provides Internet access only to the limited number of web sites the library regards as having particular value would have broad discretion to make those selection decisions. In contrast, a public library that provides access to a much wider range of materials without making individualized value judgments, but prevents access to certain materials because the library

determines that they lack sufficient value or are not sufficiently related to its mission, would have to justify its selection decisions under strict scrutiny. The district court's approach would therefore create a perverse incentive for a library to make available *less* information to its patrons in order to preserve its traditional discretion.

The district court's analysis would also seem to extend to any other resource to which a library makes a connection. For example, if a library establishes a television room with cable access, it would have to satisfy strict scrutiny to justify a decision to block programs that contain frontal nudity. Similarly, a library that offers telephone service to its adult patrons would have to satisfy strict scrutiny to preclude the use of the phone to obtain access to dial-a-porn.

Those consequences underscore the fundamental flaw in the district court's analysis. A public library has broad discretion to make content-based judgments regarding the material it makes available to the public, and forum analysis and strict scrutiny have no application to those decisions.[4]

2. Even If A Library's Connection Of Its Computers To The Internet Created A Forum, Strict Scrutiny Would Not Apply

Even if a public library's Internet-connected computers were subjected to forum analysis, strict scrutiny would not apply to a library's use of filtering software.

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[4] The district court's analysis would also seem to apply no matter where the government locates an Internet-connected computer. Under the court's analysis, a government that provides access to the Internet at city hall or a public hospital would have to justify under strict scrutiny its decision to use a filter to block illegal and harmful pornographic content.

"[T]he Court [has] identified three types of fora: the traditional public forum, the public forum created by government designation, and the nonpublic forum." *Cornelius* v. *NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985). Traditional public fora are limited to those venues such as streets and parks that have "immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communication of thoughts between citizens, and discussing public questions." *International Soc'y for Krishna Consciousness, Inc.*, v. *Lee*, 505 U.S. 672, 679 (1992) (quoting *Hague* v. *Committee for Indus. Org.*, 307 U.S. 496, 515 (1939)). The Court "has rejected the view that traditional public forum status extends beyond its historic confines." *Arkansas Educ. Television*, 523 U.S. at 678. Accordingly, if forum analysis were applicable to a library's Internet-connected computers, they could only be non-public fora or designated public fora. In either event, strict scrutiny would not apply to a library's use of filtering software to prevent access to material covered by CIPA.

The government may limit access to a non-public forum "based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purposes served by the forum and are viewpoint neutral." *Cornelius*, 473 U.S. at 806. In a designated forum, the government may limit the forum to certain purposes, and then impose limitations that are "reasonable in light of the purpose served by the forum." *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) (quoting *Cornelius*, 473 U.S. at 406). A content restriction is permissible in such a forum "if it preserves the purposes of [the] limited forum," while viewpoint discrimination "is pre-

sumed impermissible when directed against speech otherwise within the forum's limitations." *Id.* at 830.

The use of filtering software to prevent access to the graphic depictions covered by CIPA does not involve any distinctions based on viewpoint. See *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 384 (1992); *Bethel Sch. Dist. No. 403* v. *Fraser*, 478 U.S. 675, 684-685 (1986). *FCC* v. *Pacifica Found.*, 438 U.S. 726, 745-746 (1978) (plurality opinion). Moreover, libraries may regard the purposes of providing access to the Internet not to encompass providing access to the illegal, harmful, and low-value content covered by CIPA, just as many libraries view the purposes of collecting magazines not to encompass providing access to pornographic magazines. Consequently, if a library's Internet-connected computers were subjected to forum analysis, the relevant inquiry would not be whether the use of filtering software is narrowly tailored to achieve compelling interests, but whether its use is "reasonable in light of the purposes served by the forum." *Cornelius*, 473 U.S. at 806; *Rosenberger*, 515 U.S. at 839.

3. Regardless Of The Standard Of Review, A Library's Use Of Filtering Software Is Constitutionally Permissible

Under the correct constitutional analysis, a library's use of filtering software to prevent access to material covered by CIPA is subject to rational basis review. See pp. 14-20, *supra*. Under that standard, the constitutionality of using filtering software to prevent access to material covered by CIPA cannot reasonably be questioned. But regardless of whether the appropriate standard of review is "rational basis," "reasonable in light of the purposes served by the forum," or "strict scrutiny," a library's use of filtering software is a permissible exercise of the library's editorial discretion to determine what content it will make available to its patrons.

a. The district court concluded that the use of filtering software is constitutionally deficient because all leading commercial filters block a substantial amount of material that does not fit into the categories identified by CIPA or the software categories, such as "sexual activity and "full nudity," that best capture CIPA material. J.S. App. 149a. For several reasons, that technological imperfection does not call into question the constitutionality of filtering software.

First, the district court's own findings show that filtering software erroneously blocks a fraction of 1% of the material on the Internet. J.S. App. 85a (finding that one or more of the leading filtering programs erroneously blocked several thousand sites in a 500,000 web site sample that was deliberately skewed to overstate the degree of overblocking). Second, much information that is erroneously blocked can be found on another web site or on the library's bookshelves. 4/1/02 Davis Test. 92 (much information can be found on other sites); 3/28/02 Biek Test. 97-98 (finding that the first 50 sites in a search of "breast cancer" were not blocked); J.S. App. 33a (finding that many libraries carry the *The Joy of Sex* and *The Joy of Gay Sex*). Third, libraries have the capacity to permanently unblock an erroneously blocked site. *Id.* at 46a. Finally, CIPA authorizes a library to disable filtering software altogether "to enable access for bona fide research or other lawful purposes." 20 U.S.C. 9134(f)(3) (all patrons) (LSTA program); 47 U.S.C. 254(h)(6)(D) (Supp. V 1999) (adults only) (E-rate program).

Because of the first two factors, a patron will rarely need to obtain access to a site that has been blocked in

order to obtain the information he or she seeks at the library. Because of the last two factors, in the rare cases in which a patron is unable to find the information, the patron need only ask a librarian to unblock the site or (at least in the case of adults) disable the filter.

The district court viewed unblocking and disabling as inadequate because some patrons may be too embarrassed to ask for assistance from a librarian. J.S. App. 172a. Throughout the history of libraries, however, patrons have asked for help when they could not find the information they needed by themselves. Moreover, anyone who has been in a library knows that most librarians are eager to provide such assistance, and that they do so without intruding on privacy. Indeed, librarians answer more than seven million questions weekly. *Id.* at 33a-34a.

In any event, a library has the ability to process anonymous unblocking requests. J.S. App. 173a. As the district court noted, such requests may not always be processed immediately. *Id.* at 174a. But the district court's view that a patron of a public library has a First Amendment right to demand that librarians immediately process a request for information, rather than perform their myriad other responsibilities, is unprecedented and insupportable. The patron always has the option to seek access to the Internet somewhere else, rather than through the computers made available at the local public library.

b. The district court also found that there are less restrictive and equally effective ways to preclude access on computers in a public library to the pornographic visual depictions covered by CIPA. In particular, the court concluded that libraries can make clear to patrons that the library's Internet terminals may not be used to obtain access to illegal or harmful content,

and libraries can detect violations through direct observation or through logs that reveal all the sites that a patron selects. J.S. App. 158a-159a. But a system under which librarians closely monitor everyone using computers to make sure that they are not viewing material covered by CIPA would be far more intrusive, not less intrusive, than the use of filtering software. Such a regime also would materially alter the experience of visiting the library for patrons generally, including the many who prefer to steer clear (and to have their children steer clear) of pornographic web sites and would be quite content to have the library help them do so. With respect to all other media, libraries are free to make a judgment that material that would be harmful to a substantial portion of patrons should not be provided to any patrons to avoid the need for such counterproductive monitoring. Libraries should be free to make the same judgment as to the Internet.

It is also difficult to see how the district court's alternative would withstand the court's constitutional analysis. If, as the district court held, requiring a patron to request unblocking would be unconstitutional because it would deter some patrons from seeking useful information, close monitoring of patrons would seemingly be unconstitutional as well because it too would deter some patrons from seeking useful information.

The district court's proposed alternative would also risk transforming the role of a librarian from an aid to whom patrons turn for assistance in finding information into a compliance officer that many patrons might wish to avoid. Such a fundamental change in the relationship between patrons and librarians would retard rather than promote First Amendment values. Under the

court's alternative, moreover, librarians would be needlessly exposed to material that many would prefer not to see.

Those difficulties could be largely avoided through reliance on an honor system in which the library simply announces a policy and hopes it will be followed. But it is implausible to suggest that such a hands-off approach would be as effective as the use of a filtering device. Moreover, such a toothless policy would also have difficulty surviving the district court's version of strict scrutiny. A challenger could readily argue that such an approach would deter compliant patrons from viewing material that is constitutionally protected, but close to the line, while having no effect on patrons who are determined to obtain access to illegal or harmful content.[5]

In the end, the only way for a library to comply with the district court's decision may be to refrain from adopting any Internet policy, and to leave access decisions entirely in the hands of library patrons. Some libraries may wish to adopt such a policy, but the First

[5] The district court concluded that a library could protect patrons from unwilling exposure to depictions covered by CIPA by moving terminals to places where their displays cannot easily be seen by other patrons, or by purchasing privacy screens or recessed monitors. J.S. App. 165a-166a. But those alternatives would not prevent the patrons at the computers from obtaining access to visual depictions that are child pornography, obscene, or harmful to minors. To the contrary, by making it more difficult for library officials to monitor activity on the computers, the court's alternatives would make it easier for patrons to obtain access to the visual depictions covered by CIPA. Those alternatives also would not address the interest of librarians in avoiding unwilling exposure.

Amendment surely does not require it, and Congress need not subsidize it.

In sum, Congress permissibly conditioned the federal assistance it provides to public libraries to establish Internet access on a library's willingness to use filtering software to prevent access to depictions on the Internet that are child pornography, obscene, or harmful to minors. The district court erred in holding that CIPA thereby causes public libraries to violate the First Amendment.[6]

[6] There is also no merit to appellees' alternative contention that CIPA imposes an unconstitutional condition on a library's First Amendment right to provide unfiltered access to the Internet. This Court has never addressed whether governmental entities have First Amendment rights. But the courts of appeals that have addressed the issue have concluded that they do not. *Warner Cable Communications, Inc.* v. *City of Niceville*, 911 F.2d 634, 638 (11th Cir. 1990), cert. denied, 501 U.S. 1222 (1991); *NAACP* v. *Hunt*, 891 F.2d 1555, 1565 (11th Cir. 1990); *Student Gov't Ass'n* v. *Board of Trustees of Univ. of Mass.*, 868 F.2d 473, 481 (1st Cir. 1989). In any event, Congress may define a federally assisted program to include limitations on speech-related activity without violating the First Amendment rights of the recipients, provided that the recipients may continue to engage in the speech-related activity outside the federal program. *Rust*, 500 U.S. at 196; *FCC* v. *League of Women Voters*, 468 U.S. 364, 400 (1984); *Regan* v. *Taxation with Representation*, 461 U.S. 540, 545-546 (1983). That standard is satisfied here. Libraries that accept federal assistance are free to establish unfiltered computers at facilities or branches that do not receive assistance under the E-rate or LSTA programs.

CONCLUSION

The Court should note probable jurisdiction.

Respectfully submitted.

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